(13)

No. 94-203

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

FORTIS MORSE, KENNETH CURTIS BARTHOLOMEW, AND KIMBERLY J. ENDERSON,

Appellants,

v.

REPUBLICAN PARTY OF VIRGINIA AND ALBEMARLE COUNTY REPUBLICAN COMMITTEE,

Appellees.

On Appeal from the United States District Court for the Western District of Virginia

REPLY BRIEF FOR APPELLANTS

PAMELA S. KARLAN
Counsel of Record
580 Massie Road
Charlottesville, VA 22903
(804) 924-7810/7536 (Fax)

EBEN MOGLEN
Columbia Law School
435 West 116th Street
New York, NY 10027
(212) 854-8382/7946 (Fax)

GEORGE A. RUTHERGLEN
580 Massie Road
Charlottesville, VA 22903
(804) 924-7015/7536 (Fax)

DANIEL R. ORTIZ
University of Southern California Law Center
University Park
Los Angeles, CA 90089
(213) 740-2559/5502 (Fax)

Attorneys for Appellants

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INTRODUCTION

Appellees' position is simple, sweeping, and wrong. They maintain that neither the Constitution nor the Voting Rights Act offers any protection to voters excluded from the process of nominating candidates for federal office as long as a political party takes the semantic precaution of calling its nominating event a "convention." If their argument is taken seriously, then political parties would be left entirely free to bar African Americans or poor people from participating as delegates to a nominating convention, or to charge a higher delegate filing fee to Hispanics, or to bar Native Americans even from attending the caucuses and mass meetings at which delegates are elected.

Appellees (hereafter "the Party" or "RPV") claim that this absurd result is not only a faithful reading of the Voting Rights Act but is constitutionally compelled. First, the RPV claims that the statutory safeguards provided by section 5 of the Voting Rights Act were not intended to reach party nomination activities other than state-administered primary elections. *See* Brief of Appellees at 9-20, 29-40. Second, it asserts that protection of the right to participate in party nomination activities other than primaries would in any event violate the Party's First Amendment rights. *Id.* at 24-29. Third, it contends that preclearance would be unworkable and raises the specter of partisan misconduct by the federal government. *Id.* at 20-24.

Against the breathtaking assertion of immunity advanced by the RPV, appellants make only this modest claim: when a political party performs the public electoral function of selecting a candidate who receives automatic access to the general election ballot, it must seek preclearance of rules that govern who can participate in that nomination process. Nothing in our position would force the RPV to abandon nominating conventions or would infringe the Party's First Amendment rights.

I. SECTION 5 OF THE VOTING RIGHTS ACT REACHES PARTY NOMINATING CONVENTIONS

1. As we pointed out in our opening brief, the Voting Rights Act must be understood in historical context. This Court's decisions from *United States v. Classic*, 313 U.S. 299 (1941), through *Terry v. Adams*, 345 U.S. 461 (1953), established that the right to vote in the general election was impaired by interference with a voter's ability to participate in the process of deciding which candidates should appear on the general election ballot. This was true

regardless of whether the state conducted a primary election, *Classic*, *supra*; the state conducted a primary whose result then had to be ratified by a state party convention, *Smith v. Allwright*, 321 U.S. 649 (1944); or an entirely private political organization conducted a shadow election prior to any state-regulated nomination process, *Terry*, *supra*. *See* Brief for Appellants at 14-20.

Thus, when Congress enacted the Voting Rights Act, it understood that the right to vote in the general election could be substantially denied or abridged if voters were excluded from the party nomination process. Accordingly, the Act expressly protects the right to vote for "candidates for ... party office," Voting Rights Act, § 14(c)(1), 42 U.S.C. § 1973*l*(c)(1); *see also* Voting Rights Act, § 2(b), 42 U.S.C. § 1973(b) (requiring that "the political processes leading to nomination and election" be equally open to all voters).

The definitional language of § 14(c)(1) was added to the Act precisely to reach the selection of convention delegates "through a series of Party caucuses and conventions" because Congress realized that party caucuses and conventions were an integral part of the political process. 111 Cong. Rec. 16273 (July 9, 1965) (statement of Rep. Jonathan B. Bingham, author of the relevant language). *See* Brief for Appellants at 20-21, 23.[1]

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[1] The Party's attempt to explain away Rep. Bingham's statement as the view of a single legislator itself relies only on the views of a single legislator. The page in the 1982 Senate Report to which the RPV refers contains the "additional views" of Sen. Hatch, *not* the views of a majority of the Committee. *See* S. Rep. No. 97-417, 97th Cong., 2d Sess. at 129 (1982). To the extent that Sen. Hatch spoke for any other legislator, it was only by incorporating in his remarks a subcommittee report rejected by the full committee.

In any event, what Sen. Hatch criticized -- interpreting the statute

In this case, the Party concedes, as it must, that delegates to its senatorial nominating convention are "elected," *see* J.A. 23, 32, 52, 56, 62; Brief for Appellees at 2, and that the Party has never sought preclearance of any changes in the rules governing this election process (including its repeated decisions to raise the delegate filing fee), *see* J.A. 18, 24; Brief for Appellees 16.[2] Given these

based on a single, "chance" remark, made during a committee hearing, and itself subject to alternative interpretations -- does not apply to Rep. Bingham's statement. Rep. Bingham's statement was made on the floor of the House, not in a committee hearing; it explained statutory language that he proposed, and that was adopted; and it did so in terms that were not ambiguous and were themselves adopted by an authoritative committee report. *See* H.R. Rep. No. 439, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. Cong. Code & Ad. News 2437, 2464 ("an election of delegates to a State party convention would be covered by the act").

[2] The question whether the Party had to preclear its change from a primary to a convention for selecting its nominee also remains before this Court. The facts on this issue are undisputed and are based on the affidavit of David S. Johnson submitted by the Party itself: in 1990, the Party decided to select its senatorial nominee by primary although none was ever held because no one challenged the Party's incumbent. J.A. 24. At the next senatorial election, in 1994, the Party selected its nominee by convention, without preclearing this change.

Appellants raised this issue at oral argument before the district court, by proffering evidence that "the Republican Party has never pre-cleared any of its changes, including, for example, such changes as deciding to hold a primary election," Transcript of Proceedings at 5. This issue is also fairly presented by appellants' allegation challenging the Party's "imposition of a filing fee for full participation in the processes leading to the nomination of a candidate for United States Senate." J.A. 10. A primary, of course, could not have required such a filing fee, so that a change from a primary without a fee to a convention with a fee is a change that denies full participation in the nominating process.

In any event, no amendment to the pleadings was necessary to conform to the evidence. The RPV has pointed to no prejudice that it would suffer from considering this undisputed fact, and under Federal Rule of Civil

concessions, section 5's preclearance requirement follows automatically.

2. The Party nonetheless argues that because it used a nominating convention, rather than a primary, it was somehow immune from regulation under section 5. *See* Brief for Appellees at 30-40. The Party's argument proceeds from the assumption that the proper question is whether the RPV's decision to hold a nominating convention and charge a $45 fee to attend would violate the Constitution.[3] But that assumption is wrong. The proper question on the claims before this Court is one of statutory interpretation. Moreover, given the "considerable deference" to which the Attorney General's interpretation of section 5 is entitled, *see, e.g., NAACP v. Hampton County*, 470 U.S. 166, 178-79 (1985); *Dougherty County Board of Education v. White*, 439 U.S. 32, 39 (1978); *United States v. Sheffield Board of Commissioners*, 438 U.S. 110, 131 (1978), the question can best be phrased in these terms: does the RPV's imposition of a $45 fee to participate in its nomination process fall within the ambit of section 5 as construed by 28 C.F.R. § 51.7?

Section 51.7 requires political parties to seek preclearance of changes in their rules "(a) if the change relates to a public electoral function of the party and (b) if the party is acting under authority explicitly or implicitly granted by a covered jurisdiction." Contrary to the RPV's suggestion, the question is *not* whether the Party makes its

Procedure 15(b), pleadings may be amended at any time, "even after judgment," to conform to the evidence, "but failure so to amend does not affect the result of the trial of these issues."

[3] This question is presented by the first and second counts of appellants' complaint, which claim that the Party's $45 fee violates the equal protection clause and the Twenty-Fourth Amendment, *see* J.A. 9, but those claims are not now before this Court, *see id.* at 3.

selection using a public election (i.e., a primary); rather the question is whether the Party's activity is "an integral part" of the electoral process that culminates in the popular election of a Senator. *See Classic*, 313 U.S. at 314; *Smith*, 321 U.S. at 661; *Terry*, 345 U.S. at 469 (Black, J.).

Nor is it necessary for appellants to show "the fostering of racial discrimination or willful evasion of the Fifteenth Amendment" through the use of a $45 fee, as the RPV contends. Brief for Appellees at 39. The presence of such a discriminatory purpose would be critical if this were a Fifteenth Amendment case. But this is a section 5 coverage proceeding and the *only* question before this Court is whether imposing such a fee affects voting, *not* whether it reflects a discriminatory purpose or effect. *See, e.g., NAACP v. Hampton County Election Commission*, 470 U.S. at 181 ("it is not our province, nor that of the [local] District Court below, to determine whether the changes ... in fact resulted in impairment of the right to vote, or whether they were intended to have that effect. That task is reserved by statute to the Attorney General or to the District Court for the District of Columbia"); *Perkins v. Matthews*, 400 U.S. 379, 386 (1971) (same). Indeed, in *Allen v. State Board of Elections*, 393 U.S. 544 (1969), the challenged change was an ostensible *liberalization* of Virginia's regulations for casting write-in votes, yet preclearance was required. Given Virginia's history of discriminatory wealth-based restrictions on the right to participate in the political process, *see Harper v. State Board of Elections*, 383 U.S. 663 (1966), *Harman v. Forssenius*, 380 U.S. 528 (1965), there is clearly a potential for discrimination affecting the right to vote in conditioning participation on payment of the $45 fee.

3. Of course, the RPV -- like any other organization in Virginia -- has an inherent right to meet and agree upon a candidate to support in the general election.

But the RPV's convention is not just another meeting. Rather, its function is to produce a nominee who, by virtue of the Party's standing under Va. Code § 24.2-101, is placed on the general election ballot automatically, *id.* § 24-2.511, and in a preferential position, *id.* § 24.2-613 (providing that the names of nominees of political parties are to be placed on the ballot before the names of independent candidates).

Thus, contrary to the contention of the Attorney General of Virginia, this case does not concern the rights of political parties generally. This case concerns the state-created privileges of only certain select political parties, as defined specially by Virginia Code § 24.2-101. As the Attorney General states: "For parties meeting the statutory definition, ballot access is automatic." Brief Amicus Curiae of the Commonwealth of Virginia in Support of Appellees at 15. The automatic access that follows from meeting this special statutory definition does not arise from any natural or constitutional rights to political participation, as the Attorney General seems to contend. It arises directly and immediately from a Virginia statute. If that statute were repealed, the delegated function of choosing a nominee with automatic access to the ballot -- or of making certain that candidates possess the requisite amount of popular support to justify placement on the general election ballot -- would again revert to the state.

Under Va. Code § 24.2-509(B), the Commonwealth sometimes grants authority to a public official -- an incumbent senator from a political party -- to decide whether to hold a primary or nominating convention; in the absence of a public officeholder, control over the choice is granted to

party officials instead.[4] In the event the decision to hold a nominating convention is made by an incumbent senator, by virtue of his position as a government official, the Commonwealth's grant of authority, and the requisite state action, is particularly clear. But nothing turns on the fortuity that on this particular occasion the choice was made by party officeholders instead.

The RPV is free to conduct its nominations using mechanisms not authorized by Virginia law, but if it does, it must seek placement of its nominees on the general election ballot as independents. Thus, when the RPV conducts a convention to select a candidate for United States Senator who will appear on the general election ballot as the nominee of a political party, the rules the party uses to determine who can participate in that process fall within the scope of 28 C.F.R. § 51.7 and section 5 of the Voting Rights Act.

4. This Court's recent decision in *Presley v. Etowah County Commission*, 502 U.S. 491 (1992), confirms these principles. *Presley* made clear that every change that has "a direct relation to voting and the election process" requires preclearance. *Id.* at 503. In particular, section 5 covers "candidacy requirements and qualifications," the "composition of the electorate that may vote for candidates for a given office," and the "abolition of an elective office." *Id.* at 502-03. As we explained in our opening brief, these are the types of changes implicated in this case. Brief for Appellants at 29-31. Contrary to the RPV's assertions,

[4] The RPV's suggestion that Virginia lacks the authority to dictate the nomination procedure parties must use in order to receive automatic ballot access, Brief for Appellees at 31, is simply incorrect. *See American Party of Texas v. White*, 415 U.S. 767, 781 (1974) (noting that it is "too plain for argument" that a state can insist that parties with automatic ballot access use either primaries or conventions to nominate candidates); *Storer v. Brown*, 415 U.S. 724, 735 (1978) (same).

Presley's holding -- that "changes 'with respect to governance'" do not require preclearance, 502 U.S. at 510 -- has nothing to do with this case. Section 5 clearly does not reach such party "governance" decisions as "the conduct of political campaigns, and the drafting of party platforms," 28 C.F.R. § 51.7. But this case concerns only the right of qualified voters to participate fully in the nomination of a candidate for public office. Unlike *Presley*, this case does not involve any change in governance.[5]

II. Applying Section 5 to Political Party Conventions Poses No First Amendment Difficulties

1. This Court has firmly and repeatedly rejected the argument that political parties have a First Amendment right to exclude voters on the basis of race. *See Smith v. Allwright*, *supra*; *Terry v. Adams*, *supra*; *San Francisco Democratic Central Committee v. Eu*, 489 U.S. 214, 232 (1989); Brief for the United States at 23-24. To hold otherwise, as the RPV argues, would require this Court effectively to overrule *Terry v. Adams*, and to hold that as long as a political organization is not participating in a state-

[5] The Party's reliance on *Williams v. Democratic Party of Georgia*, No. 16286 (N.D. Ga. Apr. 6, 1972) (three-judge court), *aff'd*, 409 U.S. 809 (1972), is equally misplaced, as we explained in our opening brief. *See* Brief for Appellants at 28. The Party's reliance on an unreported oral decision by a three-judge court in Virginia, *Jefferson v. Quarles*, No. 87-0356-R (E.D. Va. May 27, 1987), adds nothing to their argument. Although two of the judges in *Jefferson* also sat on the three-judge court in this case, *Jefferson* was not cited in the opinion below. In any event, the analysis in *Jefferson* -- which involved a challenge to the decision of a party incumbent who had been nominated through a primary to require the use of a party caucus instead -- was clearly rejected by *Presley*, which reaffirmed the requirement that a decision to abandon elections must be precleared. 502 U.S. at 502.

sponsored and -regulated primary, it has a constitutional right to exclude black voters.

The RPV tries to sidestep this unpalatable position by claiming that this case does not involve allegations of willful racial discrimination: "There is no basis in any allegation of the Law Students for supposing that the Party desires to engage in any act which would contravene the Voting Rights Act if done by a State." Brief for Appellees at 28 n. 6. The RPV is simply wrong. If the Commonwealth were to impose a $45 fee on all voters who wished to participate in the nomination process without first obtaining preclearance, it would most certainly violate section 5. Like any other poll tax or filing fee, such a charge would clearly pose the "potential for discrimination," *Dougherty County Board of Education v. White*, 432 U.S. at 42. And given Virginia's history of discriminatory, wealth-based restrictions on the right to participate in the political process, *see Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966); *Harman v. Forssenius*, 380 U.S. 528 (1965), it beggars belief to suppose that the Attorney General or the United States District Court for the District of Columbia would find that the imposition of a fee roughly four times larger (adjusted for inflation) than the tax invalidated in *Harper*[6] has neither a discriminatory purpose nor a discriminatory effect.

Nor can the white primary cases be distinguished on the ground that racial discrimination is "so fundamentally repugnant to the value embodies by, and the rights protected by, the United States Constitution" that it is unlike any other form of exclusion from the political process. Brief Amicus Curiae of the Commonwealth of Virginia in Support of Appellees at 21. After the ratification of the Twenty-Fourth

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[6] *See* U.S. Dep't of Commerce, Statistical Abstract of the United States 481 (113th ed. 1993).

Amendment and this Court's decisions in *Harper* and *Bullock v. Carter*, 405 U.S. 124 (1972), requiring the payment of a fee to participate in the electoral process is equally repugnant to the Constitution. What is state action for purposes of prohibited racial discrimination also constitutes state action for purposes of financial restrictions on participation in the electoral process.

In any event, the RPV has never argued that its ability to charge voters $45 to participate in its nomination processes is integral to the exercise of its First Amendment rights. Perhaps a hypothetical Plutocrat Party would enjoy a First Amendment right to exclude voters who cannot or will not pay, but the RPV has asserted no such interest. *Cf. Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982) (holding that Ohio law requiring disclosure of campaign contributions and disbursements violated the First Amendment as applied to a minor party whose adherents and suppliers might face harassment if identified).[7] Thus, this case involves no collision between section 5 and the First Amendment.

2. Moreover, the interpretation of section 5 advanced by appellants and the United States avoids any possibility of such a collision. To the extent that a given party activity is shielded from state regulation by the First

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[7] Both the RPV and the Attorney General seek to distinguish this case from *Smith* and *Terry* by pointing out that Virginia, unlike 1940s and 1950s Texas, has a two-party system. *See* Brief for Appellees at 36-37; Brief Amicus Curiae of the Commonwealth of Virginia at 16-17. That distinction is legally irrelevant. As *Classic* explained, the right to participate is uniformly protected whether the party primary "invariably, sometimes or never determines the ultimate choice of the representative." 313 U.S. at 318. Moreover, it would be perverse to argue that in a state with two viable political parties, *both* parties would be free to exclude voters in violation of the Fourteenth, Fifteenth, or Twenty-Fourth Amendments.

Amendment, that activity by definition does not involve a state delegation of power. Put somewhat differently, if the First Amendment would bar a state from regulating a particular activity, then a political party's performance of that activity lies outside section 5.

Party platforms give a concrete illustration of this point. In *Brown v. Hartlage*, 456 U.S. 45 (1982), this Court held that the First Amendment essentially forbids states from regulating campaign promises. Since states cannot regulate these promises directly, parties are not acting under delegated state power when they make these promises, and thus they are not subject to preclearance. *See also* 28 C.F.R. § 51.7 (the drafting of party platforms does not require preclearance). So, too, after *Eu*, a party's decision to endorse candidates in its primary elections -- or to ban such endorsements -- would fall outside the scope of section 5, since the state's inability to regulate such activities directly means that the party's behavior does not involve a state-authorized public electoral function.

By contrast, as we have already pointed out, a state *can* pervasively regulate a party's nomination process, particularly to "prevent the derogation of the civil rights of party adherents." *Eu*, 489 U.S. at 232 (citing *Smith v. Allwright*). Thus, a party's decision to change the rules governing who can participate in its nomination process is subject to preclearance.

III. Applying Section 5 to Party Nominating Conventions Poses No Serious Logistical Difficulties

Contrary to the hyperbole in the RPV's brief, applying section 5 to nominating conventions would not eliminate

conventions as a practical method of nominating candidates. As our previous discussion suggests, the Party is simply wrong when it warns that "[i]f the filing fee is subject to preclearance than all substantive rules governing the convention must fall under the same requirement." Brief for Appellees at 20. Only those aspects of the convention that could have been subjected to state regulation in the first place fall within the scope of section 5.

Thus, a party's decisions about whether, when, and where to hold conventions and caucuses are subject to preclearance. But as the chronology of this case and the RPV's own rules show, the Party has more than enough time to obtain preclearance. The Call was issued almost six months before the Convention, J.A. 6, and it provided both the time and place for the meeting, J.A. 61. Similarly, the Party's Plan of Organization requires that notice for all local mass meetings, canvasses, and conventions be provided well in advance of the event, *see* J.A. at 51-52. Section 5 and the Justice Department's regulations require preclearance determinations to be made within 60 days, see 42 U.S.C. § 1973c; 28 C.F.R. § 51.9, and the Department also has provisions for expedited consideration when a submitting authority finds it necessary to implement a change without 60 days' lead time, *id.* § 51.34. The RPV has failed to identify *a single party rule* covered by section 5 whose adoption would have been foreclosed by the logistical requirements of the preclearance process. Such internal party decisions as the party's platform or the order in which speakers are to be recognized on the convention floor lie outside the scope of section 5 in the first place, and thus the fact that these decisions cannot be made ahead of time is irrelevant to the question whether section 5 covers changes in rules relating to who can seek certification as a delegate, when those rules themselves required certification more than 60 days before the convention, J.A. 62.

Requiring preclearance of the RPV's voting-related changes would pose no difficulty to the Department of Justice. The Attorney General reviews roughly 17,000 changes each year. *See Clark v. Roemer*, 500 U.S. 646, 658 (1991). Yet she interposes only a few hundred objections. *See, e.g., Dougherty County*, 439 U.S. at 41-42 (in 1977, less than 2% of submitted changes led to objections); Attorney General Ann. Rep. 125, 131 (1986) (in 1986, Attorney General objected to 101 of 20,000 changes). Thus, literally thousands of changes are submitted each year which are precleared without difficulty. The reason these changes must be submitted is not because they are discriminatory; the vast majority clearly are not. Rather, it is because they fall within the definition set by Congress: they involve voting standards, practices, and procedures.

Nothing in the thirty-year history of section 5 gives any support to the RPV's intimation that the Department will engage in partisan misbehavior. The claim that the Department will delay preclearance is essentially illusory: if the Department does not act within the statutory period, the party will be free to implement the change without preclearance. The claim that the Department can wrongfully prevent a party's use of nondiscriminatory rules is equally nonexistent: a party can obtain a declaratory judgment from the United States District Court for the District of Columbia. 42 U.S.C. § 1973c. The only roadblock section 5 throws in the path of a political party is one mandated by Congress: it forbids a political party in a covered jurisdiction from adopting new convention rules related to voting unless the party can show that those rules have neither a racially discriminatory purpose nor a racially discriminatory effect.

IV. Individuals Who Have Been Subjected to a Poll Tax or a "Substitute Therefor" May Bring Suit Under Section 10

As we explained in our opening brief, section 10 of the Voting Rights Act reflects Congress' determination to establish a mechanism for eradicating economic conditions on the franchise. Like many other sections of the Voting Rights Act, including its two most sweeping provisions -- sections 2 and 5 -- section 10 did not expressly provide that individuals who had been precluded from voting or who had faced a financial hardship in paying a poll tax could bring suit. Nonetheless, the same analysis this Court employed in *Allen* to imply a private right of action under section 5 requires a private right of action under section 10. *See* Brief of Appellants at 44-46. This understanding of section 10 was confirmed by amendments to the Voting Rights Act in 1975 that explicitly recognize the right of private individuals to sue to enforce the Act. *See id.* at 40-43.

Perhaps recognizing the weakness of the district court's rationale for dismissing appellants' section 10 claim, the RPV advances an alternative theory: a delegate filing fee is not a poll tax in the first place. Brief for Appellees at 45. Given the posture of this case, however, that claim involves a series of disputed facts. First, appellants alleged that the Republican Convention in fact operated as a de facto primary, since any voter who wished to attend and vote was permitted to do so. J.A. 6. If appellants' characterization is correct -- and at this stage in the litigation it must be taken as true -- then the RPV could no more condition the right to vote in its convention on payment of a $45 fee than it could condition the right to vote in a primary on such a payment. Second, if, as we have suggested above, the RPV is engaged in state action when it nominates its candidate, then the $45 is a "substitute" for a poll tax within the meaning of section

10(b); the RPV can no more impose such a charge itself than the Commonwealth could require such a payment.[8] Far from being a limited prohibition, as the RPV contends, section 10 is an explicit prohibition against any poll tax "or substitute therefor."[9]

The merits of appellants' section 10 claim are best left to the district court in the first instance, particularly since appellants' section 10 claim would be premature if this Court

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[8] That the RPV wants to finance its convention through the filing fee is legally irrelevant. *See Bullock v. Carter*, 405 U.S. 124, 147 (1972), (striking down a requirement that candidates in a party primary pay a filing fee to the party's county executive committee, despite the party's "rational" desire to raise funds). Moreover, by the Party's own account, the fee charged in this case seems to have significantly exceeded the amount necessary to finance the convention. *See* J.A. 24 (the 1993 convention cost roughly $373,000 and the filing fees for the 1994 convention amounted to roughly $511,000 – 14,614 certified delegates at $35 to the state party each). Finally, the absence of any alternative to paying a fee to participate has consistently been viewed by this Court as a fatal defect. *See, e.g., Lubin v. Panish*, 415 U.S. 709, 718 (1974).

[9] As we recount more fully in our opening brief, section 10 was enacted after the ratification of the Twenty-Fourth Amendment, which prohibits poll taxes in federal elections, and before *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), which declared poll taxes in state elections to be unconstitutional. Brief of Appellants at 40. Consequently, in section 10(a), Congress only declared poll taxes unconstitutional "in some areas." The qualification "in some areas" was necessary because *Harper* had not yet been decided when the Voting Rights Act was first enacted. Another provision in the original act, section 10(d), contemplated the possibility that some poll taxes might be valid. Pub. L. 89-110, title I, § 10(d), 79 Stat. 442 (1965). Subsection (d) allowed for the late payment of poll taxes if a poll tax were held to be constitutional, but it was repealed by the 1975 amendments to the Act. Pub. L. 94-73, § 408(1), 89 Stat. 405 (1975). The qualification "in some areas" in subsection (a) was not repealed in 1975, but it did not need to be. After the decision in *Harper*, the enforcement authority conferred by section 10(b) extended to all poll taxes "or substitute[s] therefor."

were to reverse the district court's judgment on our section 5 claim: the RPV would be prohibited from imposing any fee greater than the fee charged in 1964 unless and until it received preclearance.

V. This Case Is Not Moot

The RPV asserts that this case is moot because the convention has now occurred, and there is no further controversy. Brief for Appellees at 46. Since the Party and its local affiliates collected considerably more than $500,000 in such fees, including $45 from appellant Morse, it is not entirely surprising that they now proclaim that the game is over and everyone should go home. But this case cannot be moot as long as the Party retains the fee it collected illegally from appellant Morse. The complaint explicitly sought an order requiring the Party to refund the fee, *see* J.A. 12, and the retention of that fee remains in controversy.[10]

Moreover, with regard to appellants' request for declaratory and injunctive relief, this case falls squarely within this Court's long-standing doctrine that cases challenging electoral practices and procedures are not rendered moot by the occurrence of an individual election or nomination, because they are "capable of repetition, yet evading review," *Dunn v. Blumstein*, 405 U.S. 330, 333 n. 2 (1968) (internal quotations omitted). *See also, e.g., Anderson v. Celebrezze*, 460 U.S. 780, 784 n. 3 (1983); *Storer v. Brown*, 415 U.S. at 737 n. 8; *Rosario v.*

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[10] Appellees wrongly suggest that affirmance is the proper course should the Court find this action moot. Under such circumstances, the judgment of the court below should be vacated under *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). *See, e.g., Harris v. City of Birmingham*, 112 S.Ct. 2986 (1992).

Rockefeller, 410 U.S. 752, 756 n. 5 (1973). The Party's sworn assertions that it has consistently imposed *some* fee at its conventions and has repeatedly raised the fee, *see* J.A. 24, and its claim two pages earlier in its brief that charging such a fee reflects a "vital" party interest in avoiding reliance on large contributors to finance its convention, Brief for Appellees at 45, clearly establish the potential for repetition.[11]

CONCLUSION

For the foregoing reasons and those stated in our opening brief the judgment of the district court should be reversed.

Respectfully submitted,

PAMELA S. KARLAN
Counsel of Record
580 Massie Road
Charlottesville, VA 22903
(804) 924-7810/7536 (Fax)

GEORGE A. RUTHERGLEN
580 Massie Road
Charlottesville, VA 22903
(804) 924-7015/7536 (Fax)

EBEN MOGLEN
Columbia Law School
435 West 116th Street
New York, NY 10027
(212) 854-8382/7946 (Fax)

DANIEL R. ORTIZ
University of Southern
California Law Center
University Park
Los Angeles, CA 90089
(213) 740-7331/5502(Fax)

Attorneys for Appellants

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[11] The RPV's suggestion that this case could somehow have been fully litigated in the six months between the call for the convention and the convention itself is meritless. Already more than a year has elapsed since appellants filed their complaint.